APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

No. 81-1442

MID-AMERICA REGIONAL BARGAINING ASSOCIATION, et al.,

Plaintiffs-Appellants,

v.

WILL COUNTY CARPENTERS DISTRICT COUNCIL, et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 80 C 1832—Frank J. McGarr, *Judge.*

ARGUED OCTOBER 2, 1981—DECIDED APRIL 13, 1982

Before SPRECHER and WOOD, *Circuit Judges,* and BROWN, *Senior District Judge.**

SPRECHER, *Circuit Judge.* This case concerns the scope of the labor exemptions to the federal antitrust laws. Here, contractors and their trade associations claimed that an alleged agreement between a union, a contractor, and a public utility violated Section 1 of the Sherman Act, 15 U.S.C. § 1. Because we find that the acts alleged fall within both the "statutory" and "nonstatutory" labor exemptions we affirm the district court's dismissal of the complaint.

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* Honorable Wesley E. Brown, Senior District Judge for the District of Kansas, is sitting by designation.

I

The plaintiffs are three trade associations ("the Trade Associations") and two private contractors ("the Contractors"). The defendants are the Will County Carpenters District Council ("the union"), its international, Commonwealth Edison ("Edison"), and the Gust K. Newberg Construction Company ("Newberg"). The action stems from a labor dispute in Will County during the summer of 1979.

The Trade Associations represented most construction contractors in Will County and had traditionally negotiated a collective bargaining agreement with the union's construction workers which became the standard for all Will County contractors. In 1979, however, the Trade Associations and the union could not agree on contract terms prior to the termination of the existing contract. Soon after the contract expired, the union directed its members to engage in selective picketing and strikes against certain contractor members of the Trade Associations. The Trade Associations responded to this action by directing all their members to engage in a defensive lockout of the union.

At this time, Newberg was engaged in construction for Edison on a nuclear generating station under construction in Braidwood, Illinois, and an existing generating facility in Romeoville, Illinois. Although Newberg was not a member of any of the Trade Associations, these projects were, nevertheless, subject to the strikes and lockouts.

Edison allegedly moved to prevent work stoppage on the projects by entering into an agreement with the union whereby Edison would "pressure" Newberg, as well as its other contractors, into paying into an escrow account $2.25 per employee for each hour worked during the strike.[1] The contractors were to pay this money into

[1] Edison's other contractors, who were members of one of the Trade Associations, were not named as defendants, although they too are alleged to have participated in the escrow agreement.

the account for all work done since the expiration of the previous contract, and the funds were to be released in accordance with any collective bargaining agreement negotiated by the union and the Trade Associations.[2] Edison agreed to compensate its contractors for this expense. Newberg employed approximately twenty-five per cent of the Will County union carpenters on its Edison projects, and these workers returned to work after the escrow agreement was reached. Approximately four weeks later, on August 20, the Trade Associations and the union agreed to a $2.25 per hour minimum wage increase retroactive to June 1, 1979.

The plaintiffs then brought this action in district court.[3] The complaint alleged that the defendants had violated Section 1 of the Sherman Act, tortiously interfered with contractual relations between the Trade Associations and their members, and engaged in a civil conspiracy to interfere with these contractual relations.

The plaintiffs' Section 1 claim asserted that by entering into the escrow agreement, the defendants undercut the bargaining position of the Trade Association, thus forcing them to pay a retroactive wage equal in amount to that deposited in the escrow account. This amount, the complaint alleged, was artificially high, since it was subsidized by Edison which, as a public utility, was insulated from competition. Thus, the agreement was a combination, contract or conspiracy which imposed a wage scale that would injure the contractors, and which

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[2] The amount paid to the escrow account was in addition to the existing wage scale. Thus, if the agreement ultimately reached between the union and the Trade Associations called for a $1.25 per hour wage increase, that amount would be paid out of the escrow fund, with the remainder returned to the contractor.

[3] One of the trade associations first filed a complaint with the National Labor Relations Board alleging that the district union had failed to bargain in good faith. This claim was rejected by the Board. Letter from Alex V. Barbour, Regional Director, to Charles E. Murphy (Sept. 6, 1979) (Re: Carpenters District Council of Will County and Vicinity (Mid-America Regional Bargaining Association) Case 13-CB-8611).

interfered with the "rights" of the Trade Associations to engage in collective bargaining.

Defendants Edison and Newberg moved to dismiss the complaint, and the district court granted this motion on February 11, 1981. The court found that the only direct restraint alleged in the complaint was a restraint in the market for human labor. Such a restraint, the court found, is exempt from antitrust scrutiny under the "labor exemption" created by sections 6 and 20 of the Clayton Act, 15 U.S.C. § 17 and 29 U.S.C. § 52, and sections 4, 5 and 13 of the Norris-LaGuardia Act, 29 U.S.C. §§ 104, 105 and 113. The court ruled, therefore, that the complaint failed to state a claim upon which relief could be granted.[4] The plaintiffs challenge this ruling on appeal.

II

In reviewing the dismissal of a complaint, "the well-pleaded factual allegations of the complaint are taken as true." *Ashbrook v. Hoffman*, 617 F.2d 474, 475 (7th Cir. 1980). *Accord, Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). A dismissal will be upheld only "if it appears beyond doubt that the plaintiffs can prove no set of facts in support of their claim which would entitle them to relief." *Ashbrook v. Hoffman*, 617 F.2d 474, 475 (7th Cir. 1980). The court, however, "is not required to accept legal conclusions that may be alleged or that may be drawn from the pleaded facts." *Mitchell v. Archibald & Kendall, Inc.*, 573 F.2d 429, 432 (7th Cir. 1978) (citations omitted). Furthermore, "conclusory allegations unsupported by any factual assertions will not withstand a motion to dismiss." *Briscoe v. LaHue*, 663 F.2d 713, 723 (7th Cir. 1981). *Accord, Hiland Dairy, Inc. v. Kroger Co.*,

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[4] The court's opinion did not explain its dismissal of the state claims. However, as the defendants demonstrated in their briefs to the district court, dismissal of the state claims for lack of pendent jurisdiction was appropriate once the Sherman Act claim was dismissed. *UMW v. Gibbs*, 383 U.S. 715, 726 (1966). The plaintiffs do not challenge this aspect of the decision on appeal.

402 F.2d 968, 973 (8th Cir. 1968), *cert. denied*, 395 U.S. 961 (1969) ("In testing the legal sufficiency of the complaint . . . conclusions of law and unreasonable inferences or unwarranted deductions of fact are not admitted."). An examination of the plaintiffs' complaint in light of these standards demonstrates that the district court properly dismissed the complaint.[5]

We begin with an examination of the history of the labor exemptions. Because this history has been told in detail elsewhere,[6] our sketch can be brief. Following passage of the Sherman Act in 1890, the courts found labor to be a commodity or article of commerce under the Sherman Act, and applied the Act to invalidate the collective bargaining agreements achieved by labor unions. *See, e.g., Loewe v. Lawlor*, 208 U.S. 274 (1908); *United States v. Workingmen's Amalgamated Council*, 54 Fed. 994 (C.C.E.D.La.), *aff'd*, 57 Fed. 85 (5th Cir. 1893). In response, Congress sought to specifically exempt labor union activity by enacting sections 6 and 20 of the Clayton Act. 15 U.S.C. § 17 and 29 U.S.C. § 52. Passage of the Clayton Act, however, failed to achieve this end, for the courts continued to apply the Sherman Act to union activities. *See, e.g., Bedford Cut Stone Co. v.*

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[5] We recognize that the Supreme Court in *Poller v. Columbia Broadcasting Sys., Inc.*, 368 U.S. 464, 473 (1962), cautioned against summary dismissal of antitrust claims, but we do not read *Poller* to require that we ignore Rule 12(b)(6) of the Federal Rules of Civil Procedure in the context of antitrust claims. "[I]f the allegations of the complaint fail to establish the requisite elements of the cause of action, our requiring costly and time consuming discovery and trial work would represent an abdication of our judicial responsibility." *Havoco of America, Ltd. v. Shell Oil Co.*, 626 F.2d 549, 553 (7th Cir. 1980). *Accord, Lupia v. Stella D'Oro Biscuit Co.*, 586 F.2d 1163, 1167 (7th Cir. 1978), *cert. denied*, 440 U.S. 982 (1979).

[6] *See, e.g.*, Meltzer, *Labor Unions, Collective Bargaining and the Antitrust Laws*, 32 U. CHI. L. REV. 659, 662-66 (1965); Winter, *Collective Bargaining and Competition: The Application of Antitrust Standards to Union Activities*, 73 YALE L.J. 14, 30-38 (1963); Cox, *Labor and the Antitrust Laws—A Preliminary Analysis*, 104 U. PA. L. REV. 252 (1955).

Journeymen Stone Cutters' Association, 274 U.S. 37 (1927); *Duplex Printing Press Co. v. Deering*, 254 U.S. 443 (1921); *Alco Zander Co. v. Amalgamated Clothing Workers*, 35 F.2d 203 (E.D. Pa. 1929). Congress, therefore, enacted the Norris-LaGuardia Act, 29 U.S.C. § 101 *et seq.*, which sought to exempt labor activities from the application of various statutes. *See United States v. Hutcheson*, 312 U.S. 219, 235-36 (1941). The Clayton and Norris-LaGuardia Acts combined to provide a comprehensive exemption from antitrust liability for union activity.

In cases decided since the enactment of the Norris-LaGuardia Act, courts have defined the parameters of the labor antitrust exemption. As noted by the Supreme Court in *Connell Construction Co. v. Plumbers & Steamfitters Local 100*, 421 U.S. 616, 621-22 (1975), this has resulted in two distinct exemptions to the antitrust laws—a statutory exemption based on various sections of the Clayton and Norris-LaGuardia Acts, and a nonstatutory exemption based on an "accommodation between the congressional policy favoring collective bargaining under the NLRA and the congressional policy favoring free competition in business markets." *Id.* at 622.[7] We turn, therefore, to an examination of each of these exemptions to demonstrate that either one provided a sufficient basis for the district court's dismissal of the plaintiffs' complaint.[8]

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[7] Although the statutory and nonstatutory exemptions thus appear to be based on separate and distinct statutes, "[a]ll the major cases involving labor's antitrust exemption have purported to accommodate the Clayton, Norris-LaGuardia, Wagner, and Sherman Acts.'" *Smitty Baker Coal Co. v. UMW*, 620 F.2d 416, 423 n.14 (4th Cir.), *cert. denied*, 449 U.S. 870 (1980) (quoting *The Supreme Court, 1974 Term*, 89 HARV. L. REV. 47, 236 n.13 (1975)).

[8] The district court did not analyze the case in terms of statutory and nonstatutory exemptions. However, "[i]t is well settled that on appeal a litigant is entitled to rely on any ground for affirmance, whether or not passed upon by the trial court." *City of Milwaukee v. Saxbe*, 546 F.2d 693, 704 (7th Cir. 1976).

A

The statutory labor exemption stems from the Clayton Act, 15 U.S.C. § 17 and 29 U.S.C. § 52, and the Norris-LaGuardia Act. 29 U.S.C. §§ 104, 105, and 113. *Connell Construction Co. v. Plumbers & Steamfitters Local 100*, 421 U.S. 616, 621-22 (1975). Section 6 of the Clayton Act, 15 U.S.C. § 17, provides:

> The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor . . . organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.

Section 20 of the Act prohibits the courts from enjoining specified acts by employees that occur in the course of disputes "concerning terms or conditions of employment," and states that these acts cannot be "held to be violations of any law of the United States." 29 U.S.C. § 52.

The Norris-LaGuardia Act further expands the intended scope of the labor exemption. The Act prohibits injunctions against employees engaged in various activities during a labor dispute, even where a claim is made of an unlawful combination or conspiracy.[9] The

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[9] A labor dispute is defined by the Act as including "any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee." 29 U.S.C. § 113(c).

right to bargain collectively is specifically protected.[10] Although the Act does not by its terms provide a labor exemption from antitrust laws, "it has been interpreted broadly as a statement of congressional policy that the courts must not use the antitrust laws as a vehicle to interfere in labor disputes." *H. A. Artists & Associates v. Actors' Equity Association*, 451 U.S. 704, 714 (1981). *See* L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST 723 (1977).

The statutory exemption was first interpreted by the Supreme Court in *United States v. Hutcheson*, 312 U.S. 219 (1941).[11] There, the Court rejected the claim that a union had violated the Sherman Act by, *inter alia*, inducing other unions to cease working for the employer with which the defendant union had a labor dispute. The Court found that Congress' intent in enacting the Norris-LaGuardia Act was to preclude not only injunctions against specified union activities in labor disputes, but Sherman Act liability for those activities as well. *Id.*

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[10] 29 U.S.C. § 102 provides:

> Whereas under prevailing economic conditions . . . the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purposes of collective bargaining or other mutual aid or protection . . . .

[11] Although the Court in *Apex Hosiery Co. v. Leader*, 310 U.S. 469 (1940), examined the Clayton and Norris-LaGuardia Act provisions, the Court's decision in that case appears to have rested upon a determination that the conduct did not violate the terms of the Sherman Act. Thus, it was not necessary to examine the statutory exemption.

at 234-35. The Court enunciated a broad scope for the labor antitrust exemption:

> So long as a union acts in its self-interest and does not combine with non-labor groups, the licit and the illicit under § 20 are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means.

Id. at 232 (footnote omitted).

In *Allen Bradley Co. v. Local 3, International Brotherhood of Electrical Workers*, 325 U.S. 797 (1945), the Court applied its *Hutcheson* formulation to find that the statutory exemption had been forfeited because the union defendant had conspired with employers to restrain trade. *Id.* at 809. In *Allen Bradley*, the plaintiffs were manufacturers of electrical equipment, manufacturing outside of New York City. The defendant was the local union representing electrical workers in New York City. The plaintiffs challenged an industry-wide agreement negotiated by the union which provided that contractors would purchase equipment only from New York City electrical manufacturers, and the manufacturers would only sell to contractors employing union members. Although the union was acting in its own self-interest, there was substantial evidence that it had conspired with non-labor entities. The Court noted that this evidence extended beyond the collective bargaining agreement which, "standing alone, would not have violated the Sherman Act." *Id.*[12] The Court, therefore, found that the union had forfeited its statutory exemption.

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[12] The Supreme Court made it clear in *Local 24, Int'l Bhd. of Teamsters v. Oliver*, 358 U.S. 283, 296 (1959), that *Allen Bradley* was intended to set only "outside limits" on the normal rule that agreements reached concerning subjects of mandatory bargaining cannot lead to liability for violation of laws. The Court noted that such an approach was necessary to further the congressional policy "as expressed in the Wagner and Taft-Hartley Acts" of the "promotion of collective bargaining." *Id.* at 295.

As *Hutcheson* and *Allen Bradley* demonstrate, the central questions to be asked in determining whether the plaintiffs' complaint in this case alleged conduct not covered by the statutory labor exemption are whether the union acted in its own self-interest and whether a conspiracy between the union and a non-labor entity was properly pleaded. The plaintiffs concede that the agreement they allege between the district union and Newberg was in the union's self-interest. They claim that the agreement served to achieve an "artificially high wage increase," certainly a result that is in the union's interest. Thus, if the defendants' conduct is to fall outside the statutory exemption, the plaintiffs must allege a conspiracy under *Allen Bradley*. We find that the plaintiffs failed to properly plead such a conspiracy. While the plaintiffs' complaint uses the word "conspiracy" repeatedly, it cannot fairly be read to remove the alleged conduct from the reach of the statutory exemption.

Essentially, the plaintiffs seek to infer a conspiracy between Edison, Newberg and the union on the basis of the escrow agreement reached between the contractors and the union. Yet, more than this is needed to plead a conspiracy that would remove the alleged agreement from the coverage of the labor exemption.[13]

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[13] While the plaintiffs' complaint could be read to allege the existence of a conspiracy apart from the escrow agreement, such a reading would not be justified. The only factual assertion supporting the plaintiffs' conspiracy claim is the existence of the escrow agreement. The balance of the complaint simply infers a conspiracy from the existence of that agreement and alleges that it was entered into pursuant to "a conspiracy." This is insufficient, however. Mere "conclusory allegations unsupported by any factual assertions will not withstand a motion to dismiss." *Briscoe v. LaHue*, 663 F.2d 713, 723 (7th Cir. 1981). *See Larry R. George Sales Co. v. Coal Attic Corp.*, 587 F.2d 266, 273 (5th Cir. 1979) ("A general allegation of conspiracy . . . without a statement of the facts constituting the conspiracy, is a mere allegation of a legal conclusion and is inadequate of itself to state a cause of action. The pleader must allege the facts constituting the conspiracy, its object and accomplishment.").

Where plaintiffs base claimed conspiracies solely upon the existence of a collective bargaining agreement concerning subjects of mandatory bargaining,[14] courts have generally held that these allegations are insufficient to remove the statutory exemption from union conduct.[15]

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[14] Although the alleged "escrow agreement" between Newberg and the district union was not, strictly speaking, a collective bargaining agreement, the cases discussed herein are nevertheless applicable. The agreement allegedly reached was quite similar to a traditional collective bargaining agreement: it was between an employer and the collective bargaining agent of its employees over a subject of mandatory bargaining—wages. The fact that the final wage was not final, but rather was dependent on an external factor—the size of the wage increase granted by the Trade Associations—does not deprive it of that character. The cases holding that a collective bargaining agreement should not serve as the sole evidence of a conspiracy do not focus upon the formal requirements of a collective bargaining agreement. Rather, they focus upon the inappropriateness of basing a finding of antitrust conspiracy on an agreement reached as a result of the collective bargaining *process* commanded by the labor laws. A narrower reading of these cases would do substantial damage to the Norris-LaGuardia Act's goal of "full freedom . . . to negotiate the terms and conditions of . . . employment," 29 U.S.C. § 102, as well as the National Labor Relations Act's goal of reducing "industrial strife and unrest." 29 U.S.C. § 151.

[15] Where collective bargaining agreements pertain to subjects which are not mandatory subjects of collective bargaining, some courts have held that the agreements can serve as evidence of a conspiracy. Under § 8(d) of the National Labor Relations Act, 29 U.S.C. § 158(d), mandatory subjects of bargaining are "wages, hours, and other terms and conditions of employment." Thus, Justice White's opinion in *Local 189, Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676 (1965), found that where a union and an employer agree on mandatory subjects of bargaining an exemption applies, but the exemption is lost when agreement is reached on such topics as prices, which are not proper subjects of collective bargaining. *See American Fed'n of Musicians v. Carroll*, 391 U.S. 99, 108 (1968); L. SULLIVAN HANDBOOK OF THE LAW OF ANTITRUST 727-28 (1977).

(Footnote continued on following page)

"The mere combination by a union with 'non-labor groups' does not violate the Sherman Act. To hold otherwise would invalidate collective bargaining." *Bodine Produce, Inc. v. United Farm Workers Organizing Committee*, 494 F.2d 541, 558 (9th Cir. 1974).

In *UMW v. Pennington*, 381 U.S. 657 (1965), small mine operators brought an antitrust action against the coal miners' union. The basis of the complaint was that large employers and the union had entered into an industry-wide collective bargaining agreement that imposed a wage scale that small operators would be unable to pay. The plaintiffs claimed that this had been done for the purpose of driving them out of business.

The Court began its analysis by noting, in keeping with *United States v. Hutcheson*, 312 U.S. 219 (1941), that it is "beyond question that a union may conclude a wage agreement with the multi-employer bargaining unit without violating the antitrust laws and that it may as a matter of its own policy, and not by agreement with all or part of the employers of that unit, seek the same wages from other employers." 381 U.S. at 664. The union loses the antitrust labor exemption, however, "when

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[18] *continued*

Here, the collective bargaining agreement concerned itself with wages—explicitly identified as a proper subject of collective bargaining. Thus, the statutory exemption applies. *See Bodine Produce, Inc. v. United Farm Workers Organizing Comm.*, 494 F.2d 541, 551 (9th Cir. 1974) ("Union-imposed restraints which serve purposes closely related to wage, hours, and conditions of employment generally are considered free of *Allen Bradley* taint."). The logic behind this position is clear. "'[C]ollective-bargaining agreements over labor standards inevitably have anticompetitive consequences; to infer from these agreements the necessary elements of a conspiracy to restrain trade under the antitrust laws makes no accommodation for the fact that the national labor policy is based upon the conclusion of these agreements.'" *Smitty Baker Coal Co. v. UMW*, 620 F.2d 416, 423 n.10 (4th Cir.), *cert. denied*, 449 U.S. 870 (1980) (quoting Comment, *Labor-Antitrust: Collective Bargaining and the Competitive Economy*, 20 STAN. L. REV. 684, 704 (1968)). *See also* Leslie, *Principles of Labor Antitrust*, 66 VA. L. REV. 1183, 1203 (1980).

it is clearly shown that it has agreed with one set of employers to impose a certain wage scale on other bargaining units." *Id.* at 665. The Court qualified this statement by noting that

> Unilaterally, and without agreement with any employer group to do so, a union may adopt a uniform wage policy and seek vigorously to implement it even though it may suspect that some employers cannot effectively compete if they are required to pay the wage scale demanded by the union. The union need not gear its wage demands to wages which the weakest units in the industry can afford to pay. *Such union conduct is not alone sufficient evidence to maintain a union-employer conspiracy charge under the Sherman Act. There must be additional direct or indirect evidence of the conspiracy.*

Id. at 665 n.2 (emphasis added). Thus, the union did not lose its exemption simply by entering into a series of collective bargaining agreements. The agreements alone could not deprive the union of the labor antitrust exemption, absent further evidence of a conspiracy.[16] *Accord, California Dump Truck Owners Association v. Associated General Contractors*, 562 F.2d 607, 611 (9th Cir. 1977) ("An antitrust action based upon the [collective bargaining agreement] alone does not state a claim upon which relief can be granted."). The Court, however, found that the plaintiffs had presented proof of an agreement by the union to seek the same wages from all employers, and thus there was an adequate allegation that the statutory exemption had been forfeited. *Id.* at

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[16] One commentator has distinguished Justice White's opinion in *Pennington* from his opinion in its companion case, *Local 189, Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676 (1965), on this basis. "In *Pennington* the union had openly conspired with a group of employers," while "[i]n *Jewel Tea*, on the other hand, the collective bargaining agreement itself constituted the labor-non-labor combination." Comment, *Labor's Antitrust Exemption After Pennington and Jewel Tea*, 66 COLUM. L. REV. 742, 755 (1966).

669.[17] Here, however, all the assertions of conspiracy are based upon the escrow agreement between the defendants. Thus, the statutory labor antitrust exemption applies, and dismissal of the complaint was proper.[18]

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[17] The Court also found that the nonstatutory exemption did not apply. *See* text accompanying notes 25-27, *infra*.

There is no allegation in the plaintiffs' complaint that the union adopted a "take it or leave it" stance in negotiations with the plaintiff contractors. Indeed, the National Labor Relations Board found that this was not the case. *See* note 3, *supra*. Thus, all that can be inferred from the escrow agreement is a promise by the employer to be bound by any wage increase, up to $2.25 per hour, that the union could negotiate with other contractors. Such agreements have never been held violative of the antitrust laws.

Furthermore, even if the union had adopted such a position, the plaintiffs would have to allege that this position stemmed from a *shared purpose* with a non-labor group, and was not maintained by a union "'as a matter of its own policy.'" *Ramsey v. UMW*, 401 U.S. 302, 312-13 (1971) (quoting *UMW v. Pennington*, 381 U.S. 657, 664 (1965)).

[18] Further support for this proposition is provided by the Supreme Court's opinion in *Connell Constr. Co. v. Plumbers & Steamfitters Local 100*, 421 U.S. 616 (1975). There, the Court found that a union representing workers in the building trades violated the antitrust laws by exacting an agreement from a contractor not to subcontract work to firms lacking a collective bargaining agreement with the union. The Court noted that the union had no interest in representing the contractor's employees. Therefore, it noted that "[t]here can be no argument in this case, whatever its force in other contexts, that a restraint of this magnitude might be entitled to an antitrust exemption if it were included in a lawful collective-bargaining agreement." *Id.* at 625-26. This suggests that an agreement would not be sufficient to evince a conspirary where it was only contained in a collective bargaining agreement. *See Smitty Baker Coal Co. v. UMW*, 620 F.2d 416, 424 n.19 (4th Cir.), *cert. denied*, 449 U.S. 870 (1980); *Larry V. Muko, Inc. v. Southwestern Pa. Bldg. & Constr. Trades Council*, 609 F.2d 1368, 1373 (3d Cir. 1979); *Commerce Tankers v. National Maritime Union*, 553 F.2d 793, 801 (2d Cir.), *cert. denied*, 434 U.S. 923 (1977).

The above method of analysis is not uniformly followed, however. Some courts, including the court below, have viewed *Pennington* as a distinct model of analysis imposing a strict series of requirements for finding a collective bargaining agreement to form the basis of an antitrust violation. *See Smitty Baker Coal Co. v. UMW*, 620 F.2d 416, 432-33 (4th Cir.), *cert. denied*, 449 U.S. 870 (1980); *Embry-Riddle Aeronautical University v. Ross Aviation, Inc.*, 504 F.2d 896, 903 (5th Cir. 1974); *Bodine Produce, Inc. v. United Farm Workers Organizing Committee*, 494 F.2d 541, 560-61 (9th Cir. 1974); *Associated Milk Dealers, Inc. v. Milk Drivers Local 753*, 422 F.2d 546, 553-54 (7th Cir. 1970).[19] These requirements were accurately summarized by the district court below:

> Under *Pennington*, the plaintiff must allege five elements: 1) that the union must have agreed to impose upon other employers terms agreed to by it and a "non-labor" entity; 2) that the union activity must not be unilateral; 3) that the union activity must be at the behest of or 4) in combination with, a non-labor entity which occupies such a position in the competitive structure that it would *directly benefit* from the restraint; and 5) that the union and non-labor groups share an anti-competitive concerted purpose.

Mid-America Regional Bargaining Association v. Will County Carpenters District Council, No. 80 C 1832, slip op. at 4 (N.D.Ill. Feb. 11, 1981). *See also Smitty Baker Coal Co. v. UMW*, 620 F.2d 416, 432-33 (4th Cir.), *cert. denied*, 449 U.S. 870 (1980).

The district court noted, and we agree, that under this analysis the plaintiffs failed to allege that the non-labor entities (Newberg and Edison) would *directly* benefit from the restraint. Tying its analysis to the Supreme

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[19] Indeed, *Pennington* is sometimes viewed as a case in which the Supreme Court permitted an allegation of conspiracy to be based *solely* on an agreement concerning a subject of mandatory bargaining. *See, e.g.*, St. Antoine, *Connell: Antitrust Law at the Expense of Labor Law*, 62 VA. L. REV. 603, 621 (1976).

Court's decision in *Connell Construction Co. v. Plumbers & Steamfitters Local 100*, 421 U.S. 616 (1975), the district court correctly found that the primary effect of the agreement was on wage scales, and thus any benefit to non-labor entities would be indirect. *Mid-America Regional Bargaining Association v. Will County Carpenters District Council*, *supra* at 5.[20] Since any anti-competitive effect resulted "from the elimination of wage competition," the labor exemption covered the alleged agreement. *Id.* at 5-6.

Although the district court did not find it necessary to look beyond the question of direct impact on the business market, we note that the plaintiffs' complaint also fails to properly plead a *concerted anti-competitive purpose*. This requires a shared purpose between the union and non-labor entities to restrict competition. The complaint here, however, alleges three *different* purposes for the agreement reached among the parties. The union allegedly entered the agreement to weaken the resistance of contractors to its wage demands (¶41(d)). Edison allegedly agreed to subsidize the agreement in order to maintain production on its generating stations (¶40(d)). Finally, Newberg allegedly entered into the agreement in order to force a ruinous wage increase and thereby gain an unlawful competitive advantage (¶41(e)).

These pleadings fail on two levels to demonstrate a concerted anti-competitive purpose. First, it is clear that each party had a separate and distinct purpose—there simply was no single shared purpose.[21] Second, the only

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[20] This approach tends to result in combining what the Supreme Court in *Connell* noted were two separate analyses. The court below thus seemed to base its decision on a combination of statutory and nonstatutory exemption grounds. While the court looked to specific statutes, its analysis of impact on the labor and business markets is identified in *Connell* as analysis appropriate to determining whether there is a basis for a nonstatutory exemption.

[21] The complaint alleges that each party *knew* the likely results of its actions and, therefore, intended them. This is not

(Footnote continued on following page)

anti-competitive purpose alleged was possessed by Newberg. Yet the complaint fails to plead even this interest properly, for it alleges that Edison agreed to "pressure" its contractors into signing the escrow agreement with the union (¶40). Thus, the complaint alleges that the only party who might reap an anti-competitive benefit from the agreement did not in fact seek that result, but was forced into acting by a non-labor entity lacking anti-competitive intent. This pleading is clearly inadequate to fall within the *Pennington* model. *See Cedar Crest Hats, Inc. v. United Hatters, Cap & Millinery Workers*, 362 F.2d 322, 326 (5th Cir. 1966).

The plaintiffs' complaint, therefore, failed to properly allege a conspiracy between the defendants in this case that would remove the complained of acts from the scope of the statutory labor exemption.[22] The district court properly dismissed the complaint.

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[22] *continued*
enough, absent an allegation of *purpose*, to plead a cause of action under *Pennington*. As the court in *Embry-Riddle Aeronautical Univ. v. Ross Aviation, Inc.*, 504 F.2d 896, 903 (5th Cir. 1974), noted:

> A rule of law requiring a lower level of intent than purpose would open the way to disastrous incursions upon Congressionally-sanctified areas of labor union activity. When a union imposes a collective bargaining agreement upon Company X, it will always advantage X by forcing the same agreement on competitor Company Y which theretofore offered less advantageous terms and working conditions. This is a fact of commercial life known to all unions. But if possession of that knowledge should mean that the union had to tread warily in negotiating with Y, refraining from striking, for example, or from taking a rigid bargaining stance for fear of losing the antitrust exemption, labor policy would be stood on its head.

[22] Although both the statutory and the nonstatutory exemptions are generally phrased as exemptions for union behavior, logic dictates that they be applied to all parties when an agreement with a union forms the basis of a complaint. The exemptions would serve little purpose in furthering national labor policy if employers risked liability under the antitrust laws for entering into collective bargaining agreements. Other

(Footnote continued on following page)

B

Even were we to find that the complaint contained adequate allegations of conspiracy to remove this case from the statutory labor exemption, this would not be dispositive. Where a complaint properly alleges a conspiracy between a union and non-labor entities, a nonstatutory antitrust exemption may still apply. This is true of this case.

The foundations of the nonstatutory exemption are not as easily identifiable as those of the statutory exemption. The origins of the exemption, however, are generally traced to Chief Justice Stone's opinion in *Apex Hosiery Co. v. Leader*, 310 U.S. 469 (1940). *See, e.g., Consolidated Express, Inc. v. New York Shipping Association, Inc.*, 602 F.2d 494, 513 (3d Cir. 1979), *vacated on other grounds*, 448 U.S. 902 (1980).[2] In *Apex Hosiery*, the Court found that a violent strike, which inevitably interfered with the flow of the employer's goods in interstate commerce, was not actionable under the Sherman Act. Although the Court examined the statutes underlying the statutory exemption, it did not base its decision upon the statutory exemption. Instead, it held that because the plaintiffs had failed to show that the union's actions had been intended to operate, and had operated, as substantial restraints on *commercial competition*, no claim was stated under the Sherman Act.

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[1] *continued*

circuits have concurred in this judgment. "To preserve the integrity of the negotiating process, employers who bargain in good faith must be entitled to claim the antitrust exemption." *Scooper Dooper, Inc. v. Kraftco Corp.*, 494 F.2d 840, 847 n.14 (3d Cir. 1974). *See also Amalgamated Meat Cutters & Butchers Local 576 v. Wetterau Foods, Inc.*, 597 F.2d 133, 136 (8th Cir. 1979); *Mackey v. NFL*, 543 F.2d 606, 612 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977).

[2] Others place the genesis of the nonstatutory exemption much later, with the Supreme Court's decision in *Local 189, Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676 (1965). *See, e.g., California Dump Truck Owners Ass'n v. Associated Gen. Contractors*, 562 F.2d 607, 611 (9th Cir. 1977).

The Court contrasted restraints on commercial competition with restraints on the market for labor. "It would seem plain that restraints on the sale of the employee's services to the employer, however much they curtail the competition among employees, are not in themselves combinations or restraints in restraint of trade or commerce under the Sherman Act." *Id.* at 503. While *Apex Hosiery* appeared to rest on the ground that substantive liability under the Sherman Act did not attach to the union activities complained of, later courts and commentators have viewed the case as establishing a nonstatutory exemption from Sherman Act coverage for restraints acting primarily upon the labor market. *See, e.g., Consolidated Express, Inc. v. New York Shipping Association*, 602 F.2d 494, 513 (3d Cir. 1979), *vacated on other grounds*, 448 U.S. 901 (1980); Leslie, *Principles of Labor Antitrust*, 66 VA. L. REV. 1183, 1196-97 (1980).[24]

This exemption was more explicitly developed by Justice White's opinion in *UMW v. Pennington*, 381 U.S. 657 (1965), and *Local 189, Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676 (1965).[25] In *Pennington*, after finding the statutory exemption inapplicable to an

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[24] There is some question whether *Apex Hosiery* represents a finding of a lack of substantive liability as opposed to a finding that the conduct was exempted. Thus, one author states in one part of an article that "the actual holding" of *Apex Hosiery* "was that a union did not violate the Sherman Act by engaging in a violent primary sit-down strike," and in another that "the nonstatutory exemption apparently originated" in *Apex Hosiery*. St. Antoine, *Connell: Antitrust Law at the Expense of Labor Law*, 62 VA. L. REV. 603, 606, 618 n.64 (1976). While Justice Douglas decried the tendency to confuse the questions of liability and exemption, *Ramsey v. UMW*, 401 U.S. 302, 314 (1971) (Douglas, J., dissenting), much of the analysis of *Apex Hosiery* has been adopted in examining the nonstatutory exemption. *See, e.g., UMW v. Pennington*, 381 U.S. 657, 666 (1965).

[25] While Justice White did not write for a majority of the Court in *Pennington* or *Jewel Tea*, the Court has since looked to his opinions as authoritative expositions of the nonstatutory exemption. *See Connell Constr. Co. v. Plumbers & Steamfitters Local 100*, 421 U.S. 616, 622 (1975).

alleged conspiracy between mine operators and the union to impose a ruinous wage scale on small mine operators,[26] Justice White's opinion for the Court enunciated what is now known as the "nonstatutory exemption." *See Connell Construction Co. v. Plumbers & Steamfitters Local 100*, 421 U.S. 616, 622 (1975). Justice White looked to "national labor policy" as expressed in the National Labor Relations Act, 29 U.S.C. § 151 *et seq.*, to determine whether anything in the Act conflicted with his conclusion that the union's agreement was a proper subject of antitrust scrutiny. 381 U.S. at 666. He found that national labor policy was, in fact, violated by an agreement which "strait-jacketed" the union into an agreement to seek higher wages than an employer could afford. *Id.* The Court compared this agreement with other illegal agreements where "the restraint on the product market is direct and immediate." *Id.* at 663. The effect of this agreement was to limit the union's freedom to act in its self-interest while furthering the employers' goal of elimination of competition. *Id.* at 666-67. Such an agreement was contrary to national labor policy and thus not entitled to any exemption from antitrust liability. *See* Leslie, *Principles of Labor Antitrust*, 66 VA. L. REV. 1183, 1207 (1980). The Court emphasized that industry-wide collective bargaining, on the other hand, was permissible because "the effect on the product market, though clearly present, results from the elimination of competition based on wages among employers in the bargaining unit, which is not the kind of restraint Congress intended the Sherman Act to proscribe." 381 U.S. at 664.

In *Local 189, Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676 (1965), decided the same day as *Pennington*, the Court held that a union did not violate the antitrust laws by seeking and obtaining a collective bargaining agreement with retail stores which prohibited the sale of meat between six at night and nine in the morning. Justice White's opinion[27] suggested

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[26] *See* text accompanying notes 15-17, *supra*.

[27] Justice White's opinion received the votes of only two other Justices. There was no opinion of the Court.

that, although there was no allegation of conspiracy in the case, this did not automatically bestow an antitrust exemption upon the challenged agreement. *Id.* at 688-89.

Although this position seems to conflict with earlier statutory exemption cases, it can be reconciled with them when the nature of the agreement is considered. Justice White noted that "[e]mployers and unions are required to bargain about wages, hours and working conditions, and this fact weighs heavily in favor of antitrust exemption for agreements on these subjects." *Id.* at 689.[28] An agreement on such subjects, presumably, would receive the statutory exemption. Some agreements on nonmandatory subjects, such as price scales, however, could violate the antitrust laws. Since the agreement at issue in *Jewel Tea* fit neither category directly, it became necessary to examine whether an exemption based on policy rather than statutory language would apply:

> [T]he issue in this case is whether the marketing hours restriction, like wages, and unlike prices, is so intimately related to wages, hours and working conditions that the unions' successful attempt to obtain that provision through bona fide, arm's-length bargaining in pursuit of their own labor union policies, and not at the behest of or in combination with nonlabor groups, *falls within the protection of the national labor policy and is therefore exempt from the Sherman Act.*

Id. at 689-90 (emphasis added) (footnote omitted). In a footnote, the opinion made it clear that the "crucial determinant" was whether the agreement had a direct impact on labor interests or "the labor market." *Id.* at 690 n.5. Thus, *Jewel Tea*, in conjunction with *Pennington*, suggests the existence of a labor exemption to the antitrust laws whose boundaries were determined by attempting an accommodation between national labor policy and antitrust laws, which was reached in turn by

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[28] 29 U.S.C. § 158(a)(5) imposes a duty upon employers to engage in collective bargaining with employees.

an examination of the impact of a given agreement on the labor and product markets.[29]

This interpretation was confirmed by the Supreme Court in *Connell Construction Co. v. Plumbers & Steamfitters Local 100*, 421 U.S. 616 (1975). There, a general contractor sought to invalidate an agreement between the contractor and the union whereby the contractor agreed to deal with mechanical subcontractors only if they were parties to the union's multiemployer collective bargaining agreement. The Court began its analysis by noting that the statutory exemption does not exempt "concerted action or agreements between unions and nonlabor parties." *Id.* at 622. Nevertheless, the Court noted that "a proper accommodation between the congressional policy favoring collective bargaining under the NLRA and the congressional policy favoring free competition in the business markets requires that some union-employer agreements be accorded a limited nonstatutory exemption from antitrust sanctions." *Id.*

The Court hinged its determination on whether the agreement between the union and the employer was a "direct restraint on the business market," as opposed to an indirect restraint that would "follow naturally from the elimination of competition over wages and working conditions." *Id.* at 625. Because the union in *Connell* imposed "direct restraints on the business market" by limiting which subcontractors could receive the business of the contractor, the Court found that no exemption

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[29] A more general statement is that "the availability of the nonstatutory exemption for a particular agreement turns upon whether the relevant federal labor policy is deserving of pre-eminence over federal antitrust policy under the circumstances of the particular case." *Mackey v. NFL*, 543 F.2d 606, 613 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977) (citations omitted). The *Connell* labor-business market distinction appears to serve as a generally applicable standard for making this determination. *Id.* at 614. Where an agreement primarily affects the labor market, the policy favoring collective bargaining is preeminent, but when an agreement has a direct impact on the business market, the antitrust laws are of greater concern.

applied. *Id.* at 623. *Connell* is thus consistent with the *Apex Hosiery* mode of analysis—finding a nonstatutory exemption for restraints on the labor market which might indirectly affect the business market, but denying the exemption for direct restraints on the business market.[20]

This is the interpretation of the nonstatutory exemption adopted by the court in *Consolidated Express, Inc. v. New York Shipping Association*, 602 F.2d 494 (3d Cir. 1979), *vacated on other grounds*, 448 U.S. 901 (1980). There the court explained that "[t]he term nonstatutory exemption, commonly used in discussing the interface between the often conflicting national antitrust and labor policies, is a shorthand description of an interpretation of the Sherman Act, making that statute inapplicable to restraints imposed in the interest of lawful union monopoly power in the labor market." *Id.* at 513. Thus, "the rationale of the exemption is protection of the union's power to eliminate competition in the labor market over wages and working conditions. Restraints operating on that primary market are presumptively outside the scope of the Sherman Act." *Id.* at 514. The *Consolidated Express* court recognized, therefore, that the central examination in *Connell* was whether there was a direct restraint on business. *Id.* at 517. *See also Commerce Tankers Corp. v. National Maritime Union*, 553 F.2d 793, 801 (2d Cir.), *cert. denied*, 434 U.S. 923 (1977).

Thus, a complaint must allege conduct operating as a direct restraint upon the business market in order to avoid application of the nonstatutory exemption. Restraints operating primarily upon the business market will fall within the scope of the exemption, regardless of any indirect effects that they may be alleged to have upon commercial competition. An examination of the plaintiffs' complaint in light of the nonstatutory exemption demonstrates that the district court

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[20] The *Connell* opinion's use of the term "business market" instead of "product market" was not, apparently, indicative of a change in the Court's approach. 421 U.S. at 622.

properly dismissed the plaintiffs' complaint. The complaint alleges no more than an agreement to restrain the labor market. As such, it is exempt from antitrust scrutiny.

It is difficult to imagine a case in which the alleged agreement concerned wages more directly than the complaint here.[31] The crux of the complaint is an allegation that Newberg agreed to pay as much as a $2.25 per hour wage increase, depending on what other contractors did. The plaintiffs allege that the union knew that the effect of this agreement would be to cause other employers to offer a retroactive wage increase equal to the maximum contemplated by the union's agreement with Newberg. The restraint thus alleged is not a "direct restraint on the business market" but rather a direct restraint on the labor market, with only tangential effects on the business market. Any possible harm to the plaintiffs would "follow naturally from the elimination of competition over wages and working conditions." *Connell Construction Co. v. Plumbers & Steamfitters Local 100*, 421 U.S. 616, 625 (1975). Thus, the nonstatutory exemption would apply in this case.

III

We conclude that the district court correctly dismissed the plaintiffs' complaint. Both the statutory and nonstatutory labor exemptions served to immunize the

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[31] The Supreme Court has taken a broad view of what constitutes an agreement with a direct impact on the labor market. Thus, in *Local 24, Int'l Bhd. of Teamsters v. Oliver*, 358 U.S. 283 (1959), the Supreme Court examined a state antitrust challenge to a collective bargaining agreement. The agreement provided for a minimum wage scale for truck drivers and, to prevent evasion, included a provision that drivers who owned and operated their own vehicles would be paid a prescribed rental for their vehicles in addition to the required wage. The Supreme Court found that the state antitrust laws could not be applied. The Court found that the agreement was one directly affecting wages, and not "'a remote and indirect approach to the subject of wages.'" *Id.* at 298.

defendants' activities from antitrust liability. The order of the district court is

AFFIRMED.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

MID-AMERICA REGIONAL BARGAINING ASSOCIATION, CONTRACTORS ASSOCIATION OF WILL AND GRUNDY COUNTIES, RESIDENTIAL CONSTRUCTION EMPLOYERS COUNCIL, JOLIET CONSTRUCTION COMPANY, a Delaware corporation, and U.S. HOME CORPORATION, a Delaware corporation,

Plaintiffs,

v.

WILL COUNTY CARPENTERS DISTRICT COUNCIL, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA (AFL-CIO), COMMONWEALTH EDISON COMPANY, an Illinois corporation, and GUST K. NEWBERG CONSTRUCTION CO., an Illinois corporation,

Defendants.

No. 80 C 1832

MEMORANDUM OPINION AND ORDER

Plaintiffs, Mid-America Regional Bargaining Association ("MARBA"), the Contractors Association of Will and Grundy Counties ("CAWGC"), the Residential Construction Employers Council ("RCEC"), the Joliet Construction Company and U.S. Home Corporation have brought a three-count complaint charging defendants Will County Carpenters District Council ("Will County"), United Brotherhood of Carpenters and

Joiners of America (AFL-CIO) ("District Carpenters"), Commonwealth Edison Company ("Edison"), and Gust K. Newberg Construction Company ("Newberg") with unlawful combination and conspiracy in restraint of trade in violation of section one of the Sherman Act, 15 U.S.C. §1, interference with contractual relationships and civil conspiracy.

The specific allegations stem from the following: Plaintiffs MARBA, CAWGC and RCEC are not-for-profit corporations engaged in the business of representing commercial and residential contractors in collective bargaining agreements. Joliet and U.S. Home are contractors, members of the plaintiff associations, who have delegated the responsibility for negotiating collective bargaining agreements with their employees to the plaintiff associations.

According to the complaint, the collective bargaining agreements which had been in effect between the plaintiff associations and the District Carpenters expired on June 1, 1979. In early July, construction work in Will County, with the exception of work on Edison projects at Braidwood and Romeoville, was halted by work stoppages. During these work stoppages, the plaintiff associations and District Carpenters continued their collective bargaining.

The complaint then alleges that in July, 1979, the defendants entered into an escrow agreement, outside the collective bargaining process, which imposed artificially high construction costs on every Will County contractor employing union carpenters. Under the terms of the alleged agreement, Newberg, an employer of a substantial number of Will County union carpenters because of Newberg's contract to work at the two Edison plants, would put $2.25 per hour for each hour union carpenters worked on or after June 1, 1979, into an escrow account. Edison, a "stranger" to the union-employer relationship, allegedly instigated this arrangement and subsidized Newberg's payments. Moreover, plaintiffs contend that the escrow agree-

ment applied to approximately twenty-five percent of the relevant market. Its effect, they assert, was to directly and irrevocably raise the minimum level of carpentry costs by twenty percent and to undermine the collective bargaining process in Will County.

This cause is presently before the court on the motions of several defendants to dismiss.[1] However, this court will limit its discussion to the issues raised in Edison's brief. We do so because the issues raised therein are dispositive of the case.

Edison bases its motion to dismiss on several theories. Chief among them is the assertion that plaintiffs have failed to state a claim upon which relief can be granted pursuant to Rule 12(b)(6), Fed.R.Civ.P., in that sections 6 and 20 of the Clayton Act, 15 U.S.C. §17 and 29 U.S.C. §52, and the Norris-LaGuardia Act, 29 U.S.C. §§104, 105, and 113, which constitute the labor exemption to the antitrust laws, serve to exempt the defendants from the instant cause. The purpose of the labor exemption is to "declare that labor unions are not combinations or conspiracies in restraint of trade, and exempt specific union activities . . . from the operation of the antitrust laws." *Connell Construction Co. v. Plumbers and Steamfitters Local Union No. 100,* 421 U.S. 616, 621-22 (1975).

Edison maintains that the instant cause fits within the labor exemption because the only direct restraint alleged in the complaint is that of a restraint in the market for human labor—which is specifically exempted by section 6 of the Clayton Act. *Apex Hosiery Co. v. Leader,* 310 U.S. 469 (1940). Edison contends further that the complaint contains no allegations that the alleged activities of the defendants resulted in a direct restraint of the business market, the effect of which would be to deprive defendants of the protection afforded by the labor exemption.

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[1] In addition to Edison's motion, District Carpenters filed a motion to dismiss or, in the alternative, for summary judgment. Newberg filed a motion to dismiss with accompanying "suggestions" in support of its motion, but it also adopted Edison's memoranda in support of the latter's motion to dismiss.

In *United Mine Workers of America v. Pennington*, 381 U.S. 657 (1965), the Supreme Court articulated guidelines for determining when an agreement between a union and a non-labor group to restrain the market for human labor is no longer exempted from antitrust litigation. *See also Smitty Baker Coal Co. v. United Mine Workers of America*, 620 F.2d 416 (4th Cir. 1980). Under *Pennington*, the plaintiff must allege five elements: 1) that the union must have agreed to impose upon other employers terms agreed to by it and a "non-labor" entity; 2) that the union activity must not be unilateral; 3) that the union activity must be at the behest of or 4) in combination with, a non-labor entity which occupies such a position in the competitive structure that it would *directly benefit* from the restraint; and 5) that the union and non-labor groups share an anti-competitive concerted purpose. *Id.* at 665-69.

Plaintiffs admit that they have modeled their complaint after *Pennington* "in certain respects." Plaintiffs Memorandum in Opposition to Motions to Dismiss at 27. However, that complaint is noticably deficient in one respect. The plaintiffs fail to establish that the activities of Will County and District Carpenters were at the behest of, or in combination with, Edison and Newberg (entities which occupy positions in the competitive structure) so that the latter defendants directly benefit from the restraint. *See Apex Hosiery Co. v. Leader*, 310 U.S. 469 (1940).

Connell Construction Co. v. Plumbers and Steamfitters Local Union No. 100, 421 U.S. 616 (1975) serves to shed more light on the complicated interface between the areas of antitrust and labor law. There, the defendant union forced the plaintiff general contractor to enter into an agreement the effect of which was to impose a *direct restraint* on competition among subcontractors who employed union members. The Court held that the union, by agreement with several contractors, had rendered non-union subcontractors ineligible to compete for a portion of

available work. *Id.* at 625. "This kind of direct restraint on the business market has substantial anticompetitive effects, both actual and potential, that would not follow naturally from the elimination of competition over wages and working conditions." *Id.*

A restraint of this sort is not alleged here. The facts in the instant complaint allege only a direct restraint on the labor market. Edison concedes that a wage agreement may have an anticompetitive effect. However, that effect stems from the elimination of wage competition and is consequently protected from antitrust litigation by the labor exemption.

Included in our consideration is the recent decision of the Circuit Court of Appeals for the Ninth Circuit, *California State Council of Carpenters v. Associated General Contractors of California,* No. 77-2323 (9th Cir. Nov. 20, 1980) that plaintiffs offer in opposition to defendants' motions. In *California Council,* the unions argued that the defendants, members of a construction industry employers organization, conspired to coerce property owners, general contractors and others to hire only contractors and subcontractors who had not signed agreements with the unions. Unlike the case at bar, there, the plaintiffs contended that the employers conspired to impose a *direct* restraint on the business market. The Ninth Circuit refused to apply the statutory labor exemption. *Id. California Council* is inapposite here because it involves a direct restraint on the business, not labor, market.

In conclusion, the court finds that the safe harbor provisions of the Clayton and Norris-LaGuardia Acts prohibit pleading a cause of action that is premised on an anticompetitive conspiracy involving unions when the restraint allegedly imposed by that conspiracy is not a direct restraint on the business market. As the direct restraint imposed here is not a direct restraint on the business market, but a direct restraint on

the labor market, plaintiffs can plead no cause of action upon which relief can be granted. Accordingly, the motions of the various defendants to dismiss are granted; the case is dismissed.

ENTER:

/s/ FRANK J. MCGARR
Frank J. McGarr
United States District Judge

DATED: February 11, 1981

JUDGMENT ON DECISION BY THE COURT — CIV 32 (7-63)

UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

CIVIL ACTION FILE NO. 80 C 1832

MID-AMERICA REGIONAL BARGAINING ASSOCIATION, et al.

vs.

WILL COUNTY CARPENTERS DISTRICT COUNCIL, et al.

JUDGMENT

This action came on for trial (hearing) before the Court, Honorable Frank J. McGarr, United States District Judge, presiding, and the issues having been duly tried (heard) and a decision having been duly rendered,

It is Ordered and Adjudged that the case is dismissed.

Dated at Chicago, Illinois, this 11th day of February, 1981.

APPENDIX C

Received
April 15, 1980
H. Stuart Cunningham, Clerk
United States District Court

JUDGE McGARR

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

MID-AMERICA REGIONAL BARGAINING ASSOCIATION, CONTRACTORS ASSOCIATION OF WILL AND GRUNDY COUNTIES, RESIDENTIAL CONSTRUCTION EMPLOYERS COUNCIL, JOLIET CONSTRUCTION COMPANY, a Delaware corporation, and US HOME CORPORATION, a Delaware corporation,

Plaintiffs,

v.

WILL COUNTY CARPENTERS DISTRICT COUNCIL, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA (AFL-CIO), COMMONWEALTH EDISON COMPANY, an Illinois corporation, and GUST K. NEWBERG CONSTRUCTION CO., an Illinois corporation,

Defendants.

No. 80 C 1832

COMPLAINT

Plaintiffs, by their attorneys, complain of Defendants as follows:

COUNT I—ANTITRUST

JURISDICTION AND VENUE

1. This action is filed and the jurisdiction of this Court is invoked under the provisions of Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15 and 26, for injunctive relief and to recover damages which Plaintiffs have sustained by reason of Defendants' violations of Section 1 of the Sherman Act, 15 U.S.C. § 1 and under principles of pendent jurisdiction to recover damages which Plaintiffs have sustained by reason of Defendants' violation of the common law of the State of Illinois.

2. Defendants maintain offices, transact business and/or are found within this district. Many of the unlawful acts hereinafter alleged were performed within this district, the interstate trade and commerce hereinafter described is carried on in part within this district, and the claims hereinafter asserted arose within this district.

THE PARTIES

Plaintiffs

3. Plaintiff Mid-America Regional Bargaining Association ("MARBA") is a not-for-profit Illinois corporation with its offices at 228 North LaSalle Street, Chicago, Illinois. MARBA engages, *inter alia*, in the business of representing, pursuant to delegated authority, contractors performing industrial and commercial construction work ("commercial contractors"), throughout the Chicago Metropolitan Area, in collective bargaining negotiation of agreements with construction trade unions.

4. Plaintiff Contractors Association of Will and Grundy Counties ("CAWGC") is a not-for-profit Illinois corporation with its offices at 254½ Ruby Street, Joliet, Illinois. CAWGC

engages, *inter alia*, in the business of representing commercial contractors in Will and Grundy Counties in collective bargaining negotiation of agreements with construction trade unions. CAWGC is the sole and exclusive bargaining representative for approximately 50 commercial contractors who employ carpenters represented by Defendant Will County Carpenters District Council. CAWGC has delegated to MARBA its responsibility to negotiate collective bargaining agreements on behalf of its contractor members.

5. Plaintiff Residential Construction Employers Council ("RCEC") is a not-for-profit Illinois corporation with its offices at 1010 Jorie Boulevard, Oak Brook, Illinois. RCEC engages, *inter alia*, in the business of representing contractors performing residential construction work ("residential contractors") throughout the Chicago Metropolitan Area in collective bargaining negotiation of agreements with construction trade unions. RCEC is the sole and exclusive bargaining representative for approximately 170 residential contractors, approximately 20 of whom employ carpenters represented by Defendant Will County Carpenters District Council.

6. Plaintiff Joliet Construction Co. ("Joliet") is a commercial contractor with its offices at 301 Republic Avenue, Joliet, Illinois. Joliet engages in the construction business in Will County, Illinois and surrounding counties. Joliet is a member of CAWGC and has delegated to CAWGC and MARBA the responsibility to negotiate collective bargaining agreements with its employees and has agreed to be bound by the agreements so negotiated.

7. Plaintiff US Home Corporation ("US Home"), is a Delaware Corporation. The Illinois Communities Division of US Home ("Illinois Communities") is a residential contractor with its offices at 475 Frontage Road, Burr Ridge, Illinois. Illinois Communities engages in the construction business in Will County, Illinois and surrounding counties. US Home is a

member of RCEC and has delegated to RCEC the responsibility to negotiate collective bargaining agreements with employees of Illinois Communities and has agreed to be bound by the agreements so negotiated.

Defendants

8. Defendant Will County Carpenters District Council ("District Carpenters") is an unincorporated association with its offices at 2112 West Jefferson Street, Joliet, Illinois. District Carpenters engages in representing approximately 750 carpenter members within its territorial and occupational jurisdictions with respect to wages, hours and working conditions.

9. Defendant United Brotherhood of Carpenters and Joiners of America ("International Carpenters") is an unincorporated labor organization with its offices at 101 Constitution Avenue N.W., Washington, D.C. District Carpenters has been granted a Charter by International Carpenters and is subject to International Carpenters' Constitution and Bylaws.

10. Defendant Commonwealth Edison Company ("Commonwealth Edison") is an Illinois corporation having its offices at One First National Plaza, Chicago, Illinois.

11. Defendant Gust K. Newberg Construction Co. ("Newberg") is an Illinois corporation having its offices at 2040 North Ashland Avenue, Chicago, Illinois. Newberg engages in the commercial construction business throughout the Chicago Metropolitan Area, including Will County. Newberg Construction is not a member of CAWGC or MARBA.

TRADE AND COMMERCE

12. Carpentry work is an indispensible segment of the construction industry. The construction of any utility plant, home, office building, hospital, library, hotel, industrial plant, restaurant, or other public or private structure cannot be

completed without the necessary carpentry work being performed. Carpentry work and the cost thereof substantially involve and affect the flow of goods and services in interstate commerce in every part of the United States.

13. Plaintiff Joliet regularly and routinely purchases, uses, and handles materials and equipment transported in interstate commerce. The total volume of purchases of such materials and equipment is substantial.

14. Plaintiff US Home regularly and routinely purchases, uses and handles materials and equipment transported in interstate commerce. The total volume of purchases of such materials and equipment is substantial.

15. Plaintiffs MARBA and CAWGC represent, through delegated authority, approximately 50 commercial contractors who engage, *inter alia,* in carpentry work and employ carpenters in Will County. Several commercial contractor members of CAWGC have their headquarters outside the State of Illinois.

16. Plaintiff RCEC represents, through delegated authority, approximately 170 residential contractors who engage, *inter alia,* in carpentry work. Approximately 20 of the residential contractors represented by RCEC employ carpenters in Will County. Several residential contractor members of RCEC have their headquarters outside the State of Illinois.

17. MARBA and CAWGC are engaged, *inter alia,* in the business of representing employers in collective bargaining. In the course of their businesses, MARBA and CAWGC and their employees travel, perform services, obtain property, make purchases, receive revenues and engage in other activities in and affecting interstate commerce.

18. RCEC is engaged, *inter alia,* in the business of representing employers in collective bargaining. In the course of its business activities, RCEC and its employees travel and

perform services, obtain property, make purchases, receive revenues and engage in other activities in and affecting interstate commerce.

19. Plaintiffs MARBA, CAWGC and RCEC regularly and routinely purchase, use and handle materials and equipment transported in interstate commerce. The total dollar volume of purchases of such materials and equipment by Plaintiffs is substantial.

20. The unlawful restraints which are the subject matter hereof substantially affect the flow of goods and services in interstate commerce.

BACKGROUND FACTS

21. MARBA, on behalf of CAWGC and the individual contractor members of CAWGC, and RCEC, on behalf of its individual contractor members, historically have negotiated and entered into collective bargaining agreements with District Carpenters establishing rates of pay, hours and other conditions of employment for all union carpenters performing work for commercial and/or residential contractors in Will County.

22. After agreement is reached between MARBA and District Carpenters, all commercial contractors employing union carpenters in Will County customarily sign collective bargaining agreements incorporating terms substantially identical to those agreed to between MARBA and District Carpenters.

23. After agreement is reached between RCEC and District Carpenters, all residential contractors employing union carpenters in Will County customarily sign collective bargaining agreements incorporating terms substantially identical to those agreed to between RCEC and District Carpenters.

24. In 1976, MARBA and RCEC negotiated collective bargaining agreements with District Carpenters (the "1976 Agreements"). The 1976 Agreements were due to expire on May 31, 1979.

25. In March of 1979, District Carpenters notified the members of CAWGC and RCEC that District Carpenters intended to seek changes from the terms set forth in the 1976 Agreements.

26. Promptly thereafter, MARBA and RCEC attempted to engage in collective bargaining negotiations with District Carpenters in an effort to reach agreement with respect to wages, hours and other conditions of employment to be incorporated into collective bargaining agreements to replace the 1976 Agreements.

27. On or about May 24, 1979, District Carpenters gave notices to the Federal Mediation and Conciliation Service to commence the required thirty-day waiting period prior to a strike.

28. Despite good faith efforts by MARBA and RCEC to negotiate new collective bargaining agreements with District Carpenters, no such agreements were reached as of June 1, 1979.

29. On or about July 2, 1979, District Carpenters directed that its employee members engage in selective picketing and strikes against certain contractor members of MARBA, CAWGC and RCEC, while continuing to work for other contractor members of MARBA, CAWGC and RCEC. To counteract the "whip-saw" effects of such selective strikes, MARBA, CAWGC and RCEC, on or about July 6, 1979, directed their contractor members who were not being struck or picketed by the District Carpenters to engage in a defensive lockout of all District Carpenter members.

30. Defendant Commonwealth Edison is a large public utility which, at the time of the strike and lockout referred to above, had contracted with Defendant Newberg for Newberg's performance of construction work at a nuclear generating facility under construction in Braidwood in Will County, and for Newberg's performance of certain construction work at an existing electrical generating facility in Romeoville in Will County (the "Commonwealth Projects").

31. Newberg employed approximately 190 carpenters on the Commonwealth Projects, which constituted approximately 25% of the total of approximately 750 carpenters represented by District Carpenters at the time of the strike described above.

32. Morrison Construction Co. ("Morrison") is a commercial contractor which performed work on the Commonwealth Projects, employing at least one District Carpenter member to work on said Projects. Morrison also performs considerable contracting work for Commonwealth Edison on projects other than the Commonwealth Projects.

33. Getschow Construction Company ("Getschow") is a commercial contractor which performed work on the Commonwealth Projects, employing District Carpenter members on such Projects.

34. Because District Carpenters, MARBA and RCEC had not reached agreement on the terms of a collective bargaining agreement to replace the 1976 Agreements, the Commonwealth Projects, and substantially all other commercial and residential construction projects employing union carpenters in Will County, were subject to strikes or lockouts commencing during July, 1979.

35. A relatively small proportion of Newberg's total business activities take place in Will County; however, primarily by reason of Newberg's work on the Commonwealth Projects, at all relevant times Newberg was by far the major employer of carpenters represented by District Carpenters.

VIOLATIONS CHARGED

36. Beginning on a date unknown to Plaintiff, but prior to July 26, 1979, and continuing to on or about August 20, 1979, District Carpenters, Carpenters International, Newberg and Commonwealth Edison entered into unlawful contracts, combinations and conspiracies to utilize the unique positions of Commonwealth Edison, a non-labor party, and Newberg to (a) increase the price of carpentry services in Will County; and (b) fix and impose artificially high carpentry costs at non-competitive levels retroactively in Will County thereby injuring Plaintiffs in their business and property; and (c) interfere with the rights of MARBA, CAWCG and RCEC to engage in their respective businesses. Such contracts, combinations and conspiracies were in restraint of trade and commerce in violation of Section 1 of the Sherman Act, all is as more fully set forth hereafter.

37. As a regulated public utility and a short-term purchaser of substantial carpentry services in Will County, Commonwealth Edison was not subject to the competitive constraints that typically are important in the collective bargaining process because, among other things, Commonwealth had an expectation that it would be able to effectively pass on any increased construction cost on the Commonwealth Projects to the public and, as a short-term purchaser of substantial carpentry services in Will County, Commonwealth Edison was not seriously concerned about the long-term level of costs for those services.

38. By reason of its limited activities in Will County, except for increased costs related to the Commonwealth Projects, Newberg had little incentive, except with regard to costs on the Commonwealth Projects, to engage in effective collective bargaining with District Carpenters.

39. By reason of their respective situations as set forth in paragraphs 37 and 38 above, coupled with the unlawful coercion and/or subsidization described at paragraph 40 below, neither Newberg nor Commonwealth Edison were subject to the normal competitive pressures with respect to payments for carpentry services to which Joliet and US Home were subject and had little incentive to engage in good faith arms-length bargaining with District Carpenters.

40. On information and belief, on or about July 26, 1979, Defendants International Carpenters, District Carpenters, Newberg and Commonwealth Edison entered into an agreement whereby the unique non-competitive position of Commonwealth Edison was used, together with its unique resources and position and its considerable power as a purchaser, to unlawfully fix carpentry wages and construction costs in Will County at artificially high levels to the injury of Plaintiffs. Such agreement included the following:

(a) Commonwealth Edison, a non-labor entity, agreed with District Carpenters and International Carpenters that Commonwealth Edison would pressure Newberg, Morrison and Getschow to agree to District Carpenters' demands for artificially high retroactive wage increases for carpenters working on the Commonwealth Projects;

(b) Commonwealth Edison agreed to subsidize increased costs to Newberg, Morrison and Getschow which would result from such support;

(c) Pursuant to such pressure and subsidization, Newberg, Morrison and Getschow agreed with Commonwealth Edison, District Carpenters and International that retroactive to June 1, 1979, $2.25 per hour would be placed into an escrow for each hour of work performed by their Will County carpenter employees; and

(d) District Carpenters and International Carpenters agreed that District Carpenters' members would work on the Commonwealth Projects, whereas in the absence of said unlawful agreement, the strike then being conducted at the Commonwealth Projects would have continued until a collective bargaining agreement was negotiated.

41. Defendants knew and intended that the effects of the unlawful arrangements described above, by virtue of their application to approximately 25% of the employees represented by District Carpenters, would be to

(a) require MARBA, CAWGC and RCEC and the commercial and residential contractors represented by them to agree to retroactivity to June 1, 1979 in any agreements subsequently reached with District Carpenters;

(b) artificially fix a minimum increased wage scale of $2.25 per hour during the next year for carpentry work in Will County, constituting an approximate 20% increase;

(c) damage MARBA, CAWGC, RCEC, Joliet and US Home in their respective businesses and property;

(d) permit District Carpenters and International Carpenters to gain an unfair competitive advantage, through Commonwealth Edison's coercion and subsidization, over other parties to the collective bargaining process;

(e) unlawfully favor Newberg, Morrison and Getschow over other employers in Will County; and

(f) irreparably injure the prestige and reputation of MARBA, CAWGC and RCEC.

42. On or about August 20, 1979, MARBA and RCEC agreed to terms with District Carpenters as described in subparagraphs 41(a) and (b) above.

UNLAWFUL EFFECTS

43. The effects of the combinations and agreements described above has been

(a) to injure Joliet and US Home in their businesses by compelling them to pay wages in excess of the wages which would have been negotiated in good faith absent the unlawful conspiracy by Defendants;

(b) to cause Joliet and US Home to incur substantially increased costs and sustain losses and/or decreased profits by reason of the artificially high and retroactive wage increases resulting from Defendants' unlawful conspiracy;

(c) to injure MARBA, CAWGC and RCEC in their business by irreparably damaging their ability to retain or attract contractor members; and

(d) to injure the prestige and reputation of MARBA, CAWGC and RCEC.

44. The unlawful conduct of Defendants, unless restrained and enjoined by an order of this Court, will cause irreparable continuing injury, damage and loss to Plaintiffs.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray:

A. That the aforesaid combination and conspiracy in restraint of trade be adjudged and decreed to be in violation of Section 1 of the Sherman Act (15 U.S.C. § 1).

B. That Defendants and each of their officers, directors, agents, representatives, employees, and all persons and corporations acting or claiming to act on their behalf, or in concert with them, be enjoined and restrained from combining, con-

spiring or agreeing to restrain trade in the manner alleged herein, and from implementing the unlawful agreements reached pursuant thereto.

C. That a judgment be awarded to Plaintiffs and each of them, for threefold and damages sustained by reason of Defendants' violations of the Sherman Act, plus the cost of this suit, including attorneys' fees.

D. That this Court award such other relief to Plaintiffs as may be just and proper.

COUNT II—UNLAWFUL INTERFERENCE

1-44. Plaintiffs MARBA, CAWGC and RCEC repeat and reallege the allegations contained in paragraphs 1 through 44 of Count I of this Complaint as paragraphs 1 through 44 of this Count II.

45. Defendants knew that MARBA was, at all relevant times, the exclusive bargaining representative for CAWGC and, by delegation, the members of CAWGC and that RCEC was, at all relevant times, the exclusive bargaining representative for the members of RCEC.

46. Defendants knew that the effect of their conduct and agreements described above would be to utterly frustrate any attempts by MARBA and RCEC to negotiate agreements with District Carpenters on terms different from those effectively agreed to among Defendants and that MARBA and RCEC would, as a result of Defendants' conduct and agreements, be prevented from fulfilling their contractual obligations to effectively collectively bargain on behalf of the employers represented by them.

47. Defendants knew that the effect of their conduct and agreements described above would be to injure the reputations of MARBA, CAWGC and RCEC and damage the abilities of MARBA, CAWGC and RCEC to retain and attract members and otherwise engage in their respective businesses.

48. Defendants knew that the effect of their conduct and agreements described above would be to induce various members of MARBA, CAWGC and RCEC to breach their contractual obligations to MARBA, CAWGC and RCEC.

49. By their conduct and agreements described above, Defendants knowingly and intentionally and without lawful justification interfered with MARBA's fulfillment of its contractual obligation to represent CAWGC in bargaining with District Council.

50. By their conduct and agreements described above, Defendants knowingly and intentionally and without legal justification interfered with CAWGC's fulfillment of its contractual obligation to represent its members in collective bargaining.

51. By their conduct and agreements described above, Defendants knowingly and intentionally and without legal justification interfered with RCEC's fulfillment of its contractual obligation to represent its members in collective bargaining.

52. By their conduct and agreements described above, Defendants knowingly and intentionally and without lawful justification induced members of CAWGC to breach their contractual obligations to CAWGC.

53. By their conduct and agreements described above, Defendants knowingly and intentionally and without lawful justification induced members of MARBA to breach their contractual obligations to MARBA.

54. By their conduct and agreements described above, Defendants knowingly and intentionally and without lawful justification induced members of RCEC to breach their contractual obligations to RCEC.

55. By their conduct and agreements described above, Defendants knowingly and intentionally and without lawful justification interfered with the prospective business advantages of MARBA, CAWGC and RCEC.

56. As a result of Defendant's unlawful conduct, MARBA, RCEC and CAWGC have been seriously damaged in the following respects:

(a) The contractual obligations of MARBA, CAWGC and RCEC to represent their members have been interfered with;

(b) MARBA, CAWGC and RCEC have lost members;

(c) Members of MARBA, CAWGC and RCEC have breached their contractual obligations to MARBA, CAWGC and RCEC;

(d) MARBA, CAWGC and RCEC have been injured in their valuable goodwill and business reputations;

(e) MARBA, CAWGC and RCEC have been injured in their abilities to retain and attract members; and

(f) MARBA, CAWGC and RCEC have been injured in their business.

57. The unlawful conduct of Defendants, unless restrained and enjoined by an order of this Court, will cause irreparable continuing injury, damage and loss to Plaintiffs MARBA, CAWGC and RCEC.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs MARBA, CAWGC and RCEC pray:

A. That Defendants and each of their officers, directors, agents, representatives, employees, and all persons and corporations acting or claiming to act on their behalf, or in concert

with them, be enjoined and restrained from interfering, in the manner alleged herein, with contractual relations between MARBA, CAWGC and RCEC and their respective members and from interfering in the manner alleged herein, with prospective business advantages of MARBA, CAWGC and RCEC;

B. That a judgment be awarded to Plaintiffs, and each of them, for damages sustained by reason of Defendants' unlawful actions plus the cost of this suit, including attorneys' fees;

C That punitive damages in the amount of $1,000,000 be awarded to each of MARBA, CAWGC and RCEC; and

D. That this Court award such other relief to Plaintiffs as may be just and proper.

COUNT III—CIVIL CONSPIRACY

1-44. Plaintiffs MARBA, CAWGC and RCEC repeat and reallege the allegations contained in paragraphs 1 through 44 of Count I of this Complaint as paragraphs 1 through 44 of this Count III.

45-57. Plaintiffs MARBA, CAWGC and RCEC repeat and reallege the allegations of paragraphs 45-57 of Count II of this Complaint as paragraphs 45-57 of this Count III.

58. By their conduct and agreements described above, Defendants knowingly and intentionally, and without legal justification, conspired to injure MARBA, CAWGC and RCEC in their respective businesses and to destroy the abilities of MARBA, CAWGC and RCEC to engage in their respective businesses.

59. As a result of the conspiracies alleged above, MARBA, CAWGC and RCEC have been injured in their respective businesses.

60. The unlawful conduct of Defendants, unless restrained and enjoined by an order of this Court, will cause irreparable continuing injury, damage and loss to Plaintiffs.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray:

A. That Defendants and each of their officers, directors, agents, representatives, employees, and all persons and corporations acting or claiming to act on their behalf, or in concert with them, be enjoined and restrained from continuing or reinstituting, in the manner alleged herein, their unlawful conspiracy to injure MARBA, CAWGC and RCEC;

B. That a judgment be awarded to Plaintiffs, and each of them, for damages sustained by reason of Defendants' unlawful actions plus the cost of this suit, including attorneys' fees;

C. That punitive damages in the amount of $1,000,000 be awarded to each of MARBA, CAWGC and RCEC; and

D. That this Court award such other relief to Plaintiffs as may be just and proper.

/s/ CHARLES E. MURPHY
One of Plaintiffs' Attorneys

/s/ DONALD W. JENKINS
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APPENDIX D

The Affidavit of William Sidell, General President of United Brotherhood of Carpenters and Joiners of America during 1979, executed on June 26, 1980, provides in relevant part:

"9. I was also present at a second meeting with respect to the wage demands of the Will County District Council referred to above. The second meeting was held in Chicago, Illinois on August 6, 1979. Present at that meeting, in addition to myself, to the best of my knowledge and belief, were Dick Pepper of Pepper Construction Company and Paul Cocose of Mayfair Construction representing the Builders Association of Chicago; Art Kleinrath of Commonwealth Edison and Bill McCabe, Executive Secretary of MARBA (Mid America Regional Bargaining Association). I understand the meeting was requested by MARBA.

"10. At the meeting referred to in paragraph 9, above, the employer representatives referred to the unreasonable wage demands being made by the Will County District Council and Mr. George Perinar and stated that if such demands had to be met it would destroy the whole building industry in the area and stop a lot of construction. I advised them that I understood the situation, that it was not the first time we had had trouble with the Will County District Council and that I was doing everything in my power to alleviate the situation. I told them that a meeting had been set up in Washington, D.C. by Mr. Konyha and that hopefully it would result in moderation of the Will County District Council wage demands. I had not at that time received any report as to the meeting held on August 3, 1979. At the time of the meeting in Chicago it was my understanding that an agreement had been made by Commonwealth Edison with the Will County District Council to pay retroactively whatever wage increase was negotiated with the local contractor group and to deposit $2.25 per hour worked (the first step wage increase) in an

escrow account to guarantee such payment. A copy of a letter dated August 1, 1979 addressed to me by Mr. Kleinrath of Commonwealth Edison outlining such agreement is attached hereto as Exhibit A. I advised the employer representatives that although I would continue to attempt to persuade the Will County District Council and Mr. Perinar to moderate their wage demands that the escrow agreement had tied our hands because when the men returned to work and learned of the escrow agreement it would be pretty hard to walk away from the bargaining table with any lesser settlement—that the escrow arrangement established a sort of pattern. I advised the representatives that I felt that Commonwealth Edison had helped Mr. Perinar achieve his objective through the escrow arrangement but that we (the United Brotherhood) would do what we could. I later heard that Commonwealth Edison attempted to rescind the escrow arrangement but was advised by Mr. Perinar that if that was done the Commonwealth Edison project would be shut down."

APPENDIX E

The Affidavit of William Konyha, First General Vice President of the United Brotherhood of Carpenters and Joiners of America during 1979, executed on June 26, 1980, provides in relevant part:

> "6. In the spring of 1979 General President William Sidell told me he had met with respresentatives of the home builders with respect to the wage demands of the Will County District Council. He told me that he considered the wage demands to be excessive and unrealistic and I agreed with him. Mr. Sidell told me he had explained to the employers that we could not direct the Will County District Council to reduce its wage demands but that if nothing was worked out at the bargaining table the employers were to keep us advised and we would do what we could to help bring about a fair settlement. Mr. Sidell told me that if the matter was not resolved in bargaining he wanted me to talk to George Perinar, representative of the Will County District Council, and try to persuade him to moderate his demands and to meet with the contractors to work out a fair settlement. Mr. Sidell said, if necessary, to arrange a meeting to bring the parties together to try to work out a reasonable solution.
>
> "7. I understand that bargaining continued between the Will County District Council and the employers and that a strike ensued starting on or about July 2, 1979, and I then had a number of conversations with George Perinar and Charlie Rinehart of MARBA. My purpose in these conversations was to persuade Mr. Perinar to moderate his wage demands and meet with the employer representatives to work out a fair settlement. It was my understanding from Mr. Rinehart that George Perinar was not interested in meeting and would not alter his wage demands—that he had walked out on MARBA. I told Mr. Rinehart that the United Brotherhood had no authority to stick its nose into the District Council negotiations unless requested by the

District Council, but would do what we could. Mr. Perinar specifically told me that he was not asking for and did not want assistance from the United Brotherhood.

* * *

"12. During the meeting, and also during a period when the employer representatives left the meeting for a private discussion, I repeatedly advised Mr. Perinar that in the best interests of his membership and for the sake of future labor relations in the area, he should moderate his demands. I specifically advised Mr. Perinar that many of the contractors in the area had been union contractors for a long time and there was a good chance that some of them could not continue to operate if the District Council continued to insist upon its full wage demands. When the employer representatives were out of the meeting temporarily, Mr. Danielson made similar arguments to Mr. Perinar. Mr. Perinar at all times insisted that he was representing the wishes of his membership and their best interests and that he would not moderate his demands."

APPENDIX F

Section 1 of the Sherman Act, 15 U.S.C. § 1 provides in pertinent part:

§ 1 Trusts, etc., in restraint of trade illegal . . .

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . ."

Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15, 26 provide in pertinent part:

§ 15 Suits by persons injured

"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fees . . ."

§ 26 Injunctive relief for private parties . . .

"Any person, firm, corporation or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18 and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue. . . ."